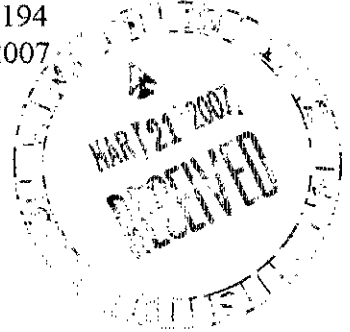


218835

Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072
(405) 360-2194
March 20, 2007



Vernon Williams, Secretary
Surface Transportation Board
395 E Street SW
Washington, D.C. 20024
Fax: (202) 245-0454

RE: Docket No. AB- 6 (Sub-No. 430X), *BNSF Railway Company – Abandonment Exemption*
– *In Oklahoma County, OK*

Dear Secretary Williams:

I am sending to your office via overnight delivery an original and ten copies of a Petition for *Ex Parte* Emergency Stay, to stay the Board's January 26, 2007 Decision in Docket No. AB- 6 (Sub-No. 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK.*, and a Supplement to my Petition to reopen / to reconsider. I am also sending via overnight delivery the original and ten copies of a Motion for Protective Order.

Respectfully,

A handwritten signature in cursive script that reads 'Edwin Kessler'.

Edwin Kessler

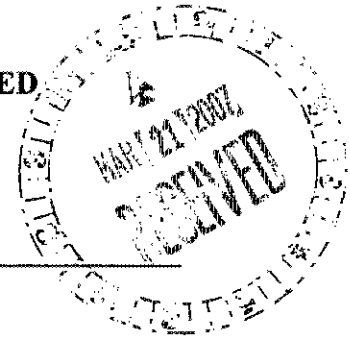
ENTERED
Office of Proceedings

MAR 21 2007

Part of
Public Record

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB DOCKET NO. AB-6 (Sub-No. 430X)

**BNSF RAILWAY COMPANY
ABANDONMENT EXEMPTION
IN OKLAHOMA COUNTY, OK**

PETITION FOR *EX PARTE* EMERGENCY STAY

SUPPLEMENT TO PETITION TO REOPEN / TO RECONSIDER

1. Edwin Kessler ("Kessler"), herewith files this Petition for *Ex Parte* Emergency Stay to stay the effective date of BNSF Railway Company's ("BNSF") Abandonment Exemption to abandon that portion of a line of railroad between milepost 539.96 and milepost 542.91, in Oklahoma City, Oklahoma, within Oklahoma County, Oklahoma (the "Line"), a distance of 2.95 miles more or less, which line of railroad is the subject of the above entitled proceeding ("AE"). The line traverses Postal Zip Codes 73102, 74108, and 73129.

2. On February 21, 2007, Thomas Elmore, spokesperson for the North American Transportation Institute, which is a party to these proceedings, received a telephone call from John Bowman, the Oklahoma Department of Transportation ("ODOT") Project Manager for the New I-40 Crosstown Relocation Project. During that telephone conversation, Mr. Bowman indicated that he had been informed by a Washington, D.C. lawyer that BNSF had authority to abandon the Line which is the subject of this proceeding. He further indicated that he was starting the process to begin demolition of the Line. See **Exhibit One: Verified Affidavit of Thomas Elmore.**

3. Your Petitioner is deeply concerned that ODOT and BNSF will, pursuant to authority granted to BNSF in the Board's January 26, 2007 decision in this proceeding, immediately commence demolition of the Line. Petitioner is further deeply concerned that if not constrained, BNSF and ODOT will cause irreparable harm to the Line prior to the Board addressing Kessler's Petition to Reopen / to Reconsider, and prior to Kessler being afforded an opportunity to make an Offer of Financial Assistance to purchase the Line.

BACKGROUND INFORMATION

4. On February 20, 2007, Kessler timely filed a Petition to Reopen / to Reconsider, requesting that the Board reopen, then reconsider, its January 26, 2007 decision in the above entitled case. In his Petition to Reopen, Kessler pointed out that BNSF's AE became effective on November 12, 2005, some 15 months prior to the Board granting Stillwater Central Railroad, Inc ("SLWC") authority to discontinue service over the Line. Kessler further pointed out that granting the AE prior to granting SLWC authority to discontinue service over the Line, was not in conformity with the Board's decision in *Consolidated Rail Corporation – Abandonment Exemption – In Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (Decided January 18, 2007) ("*Robbinsville*"). Kessler requested the Board reopen the case, set aside that portion of the Board's January 26, 2007 decision rejecting the request to revoke the AE, then on its own motion, grant BNSF an individual exemption, thereby bringing the decision into conformity with the Board's precedents. Kessler also requested the Board toll the date by which an Offer of Financial Assistance must be filed, so that Kessler could obtain 49 CFR 1152.27(a) information from BNSF.

5. On February 12, 2007, Kessler filed his formal Notice of Intent to File an Offer of Financial Assistance, to purchase the Line from the BNSF Railway Company ("BNSF").

6. On February 12, 2007, Kessler filed a Petition to Toll Date an Offer of Financial Assistance Must Be Filed By.

7. On September 23, 2005, BNSF and Stillwater Central Railroad, Inc. ("SLWC") (collectively, the "Applicants") jointly filed a notice seeking to invoke the class exemption under 49 CFR 1152 Subpart F for authority for BNSF to abandon ("AE"), and for SLWC to discontinue

service ("DSE"), over approximately 2.95 miles of railroad between mileposts ("MP") 539.96 and 542.91 in Oklahoma City, Oklahoma County, OK ("Notices"). Notice of the exemptions was served and published in the *Federal Register* on October 13, 2005 (70 FR 59802), and the exemptions were scheduled to take effect on November 12, 2005. In their Notices, the Applicants averred no local traffic had originated or terminated on any portion of the Line the Applicants proposed to abandon.

8. On November 9, 2005, Bio-Energy Wellness Center and the North American Transportation Institute (collectively, "Petitioners"), filed a Petition to Revoke the AE and DSE, arguing they contained false and misleading information, specifically, that local traffic had been shipped over the Line within the two-year period of time prior to the September 23, 2005 filings by BNSF and SLWC. The Petitioners proffered photographs depicting rail cars at various locations on the Line.

9. In its January 26, 2007 decision, the Board found that the Petitioners had failed to offer any support for their attack on the railroads' certifications that the Line had not carried any local traffic during the two year period of time prior to the September 23, 2005 filing of the Notices.

10. In its January 26, 2007 decision, the Board found that SLWC's December 28, 2004 acquisition of a leasehold interest in, and operating rights over, portions of the Line, **"indicates a perception of a demand for service, at least at the time of the transaction, over that portion of the line [that was subject to the lease and operating rights]. Such a perception contravenes the predicate of the class exemption: that 2 years of inactivity indicates no need for service."** *Op. at 4.* (Emphasis added.)

11. The Board denied the Petition to Reject the AE filed by BNSF; the Board granted the Petition to Reject SLWC's DSE. The Board then granted, on its own motion, an Exemption for SLWC to discontinue service over those portions of the Line that it leases from BNSF.

SUPPLEMENT TO PETITION TO REOPEN / TO RECONSIDER

12. In his Petition to Reopen / to Reconsider, Kessler argued that the Board should reopen,

then reconsider its decision in light of the Board's decision in *Consolidated Rail Corporation – Abandonment Exemption – In Mercer County, NJ*, STB Docket No. AB-167 (Sub-No. 1185X) (Decided January 18, 2007) ("*Robbinsville*"), wherein the Board ruled that authority to abandon may not be granted prior to discontinuance of all trackage rights. Kessler believes this constitutes material error.

13. Kessler herewith supplements his Petition to Reopen / to Reconsider, to include his request that, pursuant to 49 U.S.C. §10502(d), the Board revoke, *ab initio*, BNSF's Exemption Notice, on the grounds that BNSF's Exemption Notice contained false and misleading information, specifically (1) that SLWC did not have operating authority over the entire Line, and (2) that there was no demand for local rail service. Kessler would argue the new evidence contained herein, constitutes new evidence, or substantially changed circumstances.

SLWC HAS AUTHORITY TO OPERATE OVER THE ENTIRE LINE BOARD'S DECISION CREATES A STRANDED SEGMENT

14. In its January 26, 2007 Decision the Board found that based on pleadings submitted by the Applicants, and based on a Lease Exemption served on January 19, 2005 (STB FD No. 34610) (see footnote 1 of the Board's Decision) SLWC sought to discontinue serving "two unconnected segments, one only .04 of a mile long and the other .91 of a mile long. The two segments are 2 miles apart. These two small disconnected segments do not allow SLWC to operate over the 2.95-mile line that ... BNSF seeks to abandon." "Thus, SLWC has no authority to serve any of the shippers that the petitioners claim need service." "**SLWC does not appear to possess operating authority for the middle portion of the line between mileposts 540.0 and 542.0.**" *Op. at 5.* (Emphasis added.)

15. On February 15, 2007, Gail Poole photographed a SLWC train heading west. See **Exhibit Two: Affidavit of Gail Poole with accompanying Photo of SLWC train at MP 541.65.** The photographer was standing on the north side of the right-of-way, where the right-of-way crosses McKinley Ave, near **Milepost 541.65.** The photographer was looking east, toward the center of Oklahoma City, when the photograph was taken. The lead locomotive was

Locomotive Leasing Partners No. LLPX 213. The second locomotive was Helm Leasing Corporation No. HLCX 362. Both locomotives are leased to SLWC.

16. The presence of a SLWC train at MP 541.65 contravenes pleadings made by the Applicants, and undermines the basis for the Board's conclusion that "SLWC does not appear to possess operating authority for the middle portion of the line between mileposts 540.0 and 542.0." *Op. at 5.*

17. The Board, in its January 26, 2007 Decision, granted SLWC authority to discontinue service between MP 539.96 and MP 540.0; And between MP 542.0 and MP 542.91. The Board **did not** grant SLWC authority to abandon service between MP 540.00 and MP 542.0. Given the fact that SLWC was operating a train between MP 540.0 and MP 542.0, it would be correct to assume that SLWC has authority to operate over that portion of the Line. Consequently, by not granting SLWC authority to discontinue service over that portion of the Line between 540.0 and 542.0, the Board inadvertently created a stranded line segment. In *Futurex Industries, Inc. v. I.C.C.*, 897 F.2d 866 at 870-873 (7th Cir. 1990), the court stated:

"We must, of course, be vigilant to detect and restrain the latter phenomenon [segmentation of a line] should it appear." Quoted in *Caddo Antoine and Little Missouri R. Co. v. U.S.*, 95 F.3d 740 at 748 (8th Cir. 1996).

DEMAND FOR LOCAL SERVICE

18. On February 20, 2007, BNSF and SLWC filed a joint Motion to Reject Petition to Toll Date an Offer of Financial Assistance Must Be Filed By ("Petition to Reject"). On page 10 of that Petition, BNSF argued "the Board found that there are no shippers located along the Line." BNSF further argued that "Without any shippers to serve, there is no lawful reason for Mr. Kessler to seek an OFA."

19. In *Tulare Valley R. Co. – Aban. – Kings & Tulare County, CA*, 9 I.C.C. 2d 1205 (1993), the ICC stated:

"We have noted that "the class exemption is intended to provide a simple, expedited

procedure for railroads to discontinue service or abandon lines and remove track and materials from lines **that are not needed ***.**” *Exemption*, 2 I.C.C.2d at 155. **The new buyer, presumably, saw a need [for service] in acquiring the line.**” (Emphasis added.)

20. In its January 26, 2007 Decision, the Board stated:

“Here, the acquisition of rights over a portion of this line – albeit by a lessee rather than a buyer – indicates a perception of a demand for service, at least at the time of the transaction, over that portion of the line. Such a perception contravenes the predicate of the class exemption: that 2 years of inactivity indicates no need for service.”

21. Attached hereto is a letter from a shipper who has expressed an interest in receiving freight rail service via the Line. **See Exhibit 3: Letter from MDRC.** In addition, two shippers along the Line, the Boardman Company, at MP 541.75, and Producers Co-Op Oil Mill, at MP 540.16, have privately indicated they do not want to lose their freight rail service. The location of these two shippers is depicted on **Exhibit 4: Oklahoma Trackage.** Boardman manufactures large industrial condensers. While smaller condensers can be shipped via motor carrier, Boardman has indicated it would prefer to ship really large condensers via rail.

PRODUCERS CO-OP OIL MILL

22. Producers Co-Op Oil Mill (“Co-op”) manufactures cotton seed oil. It ships much of its products via rail. On February 18, 2007, Kessler photographed a large number of rail cars sitting on the tracks inside the Co-op facility. **See Exhibit 5: Affidavit of Edwin Kessler.** Some of the car numbers were: BN 249129 (a box car); NATX 250686, PROX 74296, UTLX 642593, UTLX 665568, DBUX 250306, DBUX 250212, DBUX 250311 (all tanker cars). On February 27, 2007, Thomas Elmore visited the Co-op site. Mr Elmore observed that **none** of the rail cars that were at the Co-op site on February 18, 2007, were still on the Co-op site on February 27, 2007. He photographed a BNSF crew delivering a new set of rail cars to the Co-op site. The engine numbers were BNSF 3828 and BNSF 3956. The car numbers for the cars that were delivered to the Co-op site on February 27, 2007 were: RBOX 32454, BN 249984, BN 249525, BN 725610, BN 725966 (all box cars); DBUX 250201, NATX 250396 (tanker cars). **See Exhibit One: Verified Affidavit of Thomas Elmore.**

23. While the Co-op shipper is adjacent to a Union Pacific ("UP") line, presently there is no lead connecting this shipper with the UP line. See **Exhibit 6: Google Map of Oklahoma City**. Once the Line is abandoned, this shipper will lose its BNSF / SLWC rail carrier service.

MID-STATES LUMBER COMPANY

24. Attached to the Verified Statement of Thomas Elmore are photocopies of two letters concerning Mid-States Lumber Company ("Mid-States"), dated **August 22, 2005** and **September 23, 2005** (the date BNSF filed its AE). Mid-States Lumber Company is one block north of the Producers Co-op Oil Mill, and is served via the BNSF line that is the subject of this proceeding. See the Oklahoma City Trackage diagram attached to Gail Poole's Verified Affidavit, and Photograph No. One attached to Kessler's Verified Affidavit. In the August 22, 2005 letter, BNSF makes reference to the fact that BNSF expects to discontinue providing rail service to Mid-States. In the September 23, 2005 letter, BNSF makes reference to the average number of rail cars BNSF had shipped to Mid-States prior to the date of the letter. BNSF indicated it had shipped an average of two rail cars per month to Mid-States. If, in the two years prior to BNSF's September 23, 2005 filing, it had not shipped any rail cars to Mid-States, there would have been no need to send the letter to Mid-States, nor would BNSF have stated it had shipped an average of two rail cars per month to Mid-States. Nor would BNSF have been attempting to bill the Oklahoma Department of Transportation for the extra costs associated with transloading shipments destined to Mid-States. Kessler would argue these letters constitute verifiable proof that Mid-States received rail service from BNSF in the two year period prior to the September 23, 2005 date BNSF filed its AE.

ARGUMENT

THE STAY SHOULD BE GRANTED

25. Kessler has asked the Board to reopen, to reconsider, and to revoke BNSF's AE, then to grant BNSF an individual exemption, and to toll the date an Offer of Financial Assistance must be filed by. This request for a Stay satisfies all of the criteria articulated in long-standing precedent

governing the issuance of a stay. Because the Board's January 26, 2007 decision was not in conformity with the Board's precedents, Kessler has a substantial likelihood of success on the merits of his Petition to Reopen. In addition, since Kessler has provided the Board with verifiable proof that as recently as February 27, 2007, BNSF provided rail service to a shipper located on that portion of the Line that is the subject of BNSF's AE, Kessler has a substantial likelihood of success on the merits of his Petition to Reject BNSF's AE on the grounds that it contained false and misleading information (that no shipper on the Line desired rail service). No harm will come to BNSF, for BNSF stated in a letter dated September 19, 2006, BNSF indicated it would not be able to consummate the abandonment of this line any sooner than December 31, 2007, and requested an extension of the time within which it had to consummate the abandonment. Therefore a delay will not prejudice BNSF's interests. The public interest supports issuance of the Stay, for it would prevent irreparable harm being done to the Line prior to final resolution of this proceeding. Kessler's interests will be served, for there will continue to be a line of railroad that he could acquire and operate. Were BNSF to salvage the Line prior to final resolution of these proceedings, the injury to Kessler would not be reparable by payment of money damages. [BNSF could argue in salvaging the Line, it was only doing what it had authority to do. And consequently, it could argue it was not liable for damages, nor would it have to restore the Line.]

26. The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. F.D. 33887, *Illinois Central R. Co. – Construction and Operation Exemption – In East Baton Rouge Parish, LA, slip op.* (Service Date February 20, 2002), citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for a stay. *Id.*

Kessler is likely to prevail on the merits

27. Kessler satisfies those requirements. First, Kessler is likely to prevail on the merits of his Petition to Reopen. For reasons described in that Petition, this Board is likely to revoke BNSF's

AE. The Board's prior precedent has held authority to abandon a line of railroad cannot be granted prior to the Board granting discontinuance of service authority to all other carriers having authority to provide common carrier service on the line. In its January 26, 2007 decision, the Board held SLWC's authority to provide common carrier service on the Line continued up until the Board granted SLWC an individual exemption to discontinue service on the Line, effective January 26, 2007. Because the Board's January 26, 2007 decision was not in conformity with its prior precedents, and because the Board did not persuasively distinguish this proceeding from its prior precedents, the AE will likely be revoked. In addition, since Kessler has demonstrated a continuing desire for, and actual use of, local service on that portion of the Line, which is the subject of BNSF's AE, this demonstration of local demand for service indicates far more than just a "**perception** of a demand for service," (January 26, 2007 decision), it indicates an actual, ongoing demand for service. And if "such a **perception** contravenes the predicate of the class exemption: that 2 years of inactivity indicates no need for service," then Kessler would argue that an **actual, ongoing demand** for service likewise would contravene the predicate of the class exemption.

28. Furthermore, Kessler's and Elmore's observations of substantial inbound and outbound rail traffic at the Co-op would negate the Board's January 26, 2007 conclusions that "Petitioners' allegations of local traffic are therefore without merit," and "Because BNSF has carried no local traffic over the line for at least 2 years, petitioners' tacking argument affords no basis for rejecting BNSF's notice."

29. And finally, Kessler would argue, his offer to purchase the Line, "indicates a perception of a demand for service." His perception is buttressed by the request for service from MDRC, by the private comments of the Boardman Company, and by the continued use of freight rail service by the Producers Co-Op Oil Mill.

30. And as the Board indicated in its January 26, 2007 decision, "a perception of a demand for service ... contravenes the predicate of the class exemption." And if the predicate for the class exemption has not been met, then Kessler is likely to prevail on the merits of his Petition to Reopen / to Reconsider / and to Revoke.

Irreparable harm to Kessler

31. Second, Kessler expects to file an Offer of Financial Assistance to purchase the Line. Demolition of the Line prior to Kessler making his Offer of Financial Assistance, would cause irreparable harm to Kessler. Were BNSF to demolish the Line prior to revocation of the AE, BNSF could argue it was not liable for monetary damages, nor was it legally liable for reconstruction of the Line, since it had demolished the Line pursuant to Board authority.

BNSF will not be harmed by the Stay

32. Third, BNSF will not be harmed by the Stay, since BNSF has stated it would not be able to consummate its salvage operations prior to December 31, 2007. Delaying salvaging activities until the Board can rule on Kessler's Petition to Reopen, would not adversely impact BNSF's ability to consummate its salvaging activities by December 31, 2007.

The Stay will be consistent with the public interest, and with rail transportation policy

33. Finally, issuance of the Stay will be consistent with the public interest, and with rail transportation policy. The public interest will be served by preserving the Line, for the Board has a "statutory duty to preserve and promote continued rail service, [citations omitted] and, specifically in the context of the "abandonments or discontinuance of rail service," that one of its "function[s] ... is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service." *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1187 (D.C. Cir. 2004). There are strong statutory and Board policies favoring the preservation of rail services, and the provision of adequate service for rail shippers. As the *Cross Harbor* court pointed out, at p. 1187, depriving a rail shipper of the availability of rail service options that it already has, would require a **very strong showing** that such action is in the public interest.

34. Issuing a stay will prevent BNSF from immediately proceeding with salvaging activities that will subsequently have to be reversed once Kessler's Petition to Reopen is granted and

BNSF's AE is revoked. Moreover, imposing a stay will prevent BNSF from taking any action pursuant to putative authority that allegedly springs from being granted authority to abandon the Line effective November 12, 2005. The integrity of this Board's processes will be preserved, and no party will need to waste resources in trying to prevent BNSF from taking actions under the color of its AE, which actions could cause irreparable harm to the Line, to Kessler's right to purchase the line, and to the shipping public.

KESSLER IS FINANCIALLY RESPONSIBLE

35. On page 11 of its Petition to Reject, BNSF and SLWC argued: "Finally, it is apparent from Mr. Kessler's filings that neither he nor his associates are "financially responsible" within the meaning of 49 U.S.C. 10904." While a reply to a reply is not permitted, occasionally the Board has permitted a reply to a reply when one party raises an issue for the first time, and when a response to that new issue would provide the Board with a more complete record. With the above in mind, Kessler would ask that the Board permit the following responses, so that the Board has as complete a record as possible prior to rendering its decision.

36. Normally, the issue of financial responsibility is addressed **after** an Offer of Financial Assistance has been tendered. However, since BNSF and SLWC have raised this issue, with the Board's consent, Kessler will address it at this time. Filed contemporaneously with this Supplement, is a Motion for Protective Order, with accompanying financial statements. Kessler believes the Board will find him and his associates to be financially responsible persons.

KESSLER'S DESIRE TO PROVIDE CONTINUED FREIGHT SERVICE

37. On page 10 of the Petition to Reject, BNSF argued Kessler is not seeking to acquire the Line for the purpose of continuing to provide freight rail service. To support this argument, BNSF attached a copy of the December, 2006 issue of the *Common-tary*. A close reading of that publication would reveal that Mr. Kessler, and the other members of Oklahoma Common Cause, **strongly** favor transportation by rail carrier over transportation by motor carrier. At the end of the first paragraph appears the following:

"... as it becomes evident and indeed urgent that we reintroduce the most efficient form of transportation available for passengers and freight ..." *Common-tary* at 1.

38. Starting on page 5 of the *Common-tary* is an article by Kessler. On page 6, Kessler states in his article:

"Two further aspects of multifaceted transportation problems are presented here. First, there is the Crosstown process in Oklahoma City and second, **the more general problem of rail transportation.**" (Emphasis added.)

"Nevertheless, the decision remains to eviscerate a facility, perhaps "the best in the west", that was the hub of a passenger rail network and multimodal transportation center fifty years ago and **could so serve again at minimal cost.**" ("Emphasis added.)

"While this intense rail activity is ongoing around our country, Oklahoma City is the only city that is planning to eviscerate a major rail facility that could serve as a viable and economical rail hub!" *Common-tary* at 7.

39. Kessler is a strong advocate of transportation by rail. His feelings on this subject are so intense, he has decided to invest his own personal funds into this rail project, in order to ensure this vital rail link is not lost.

CONCLUSION

40. BNSF and SLWC both desire to divest themselves of their common carrier obligations to provide freight rail service over the Line. Kessler has made known his desire and willingness to assume those common carrier obligations. The most expeditious solution in this situation, would be to reopen the proceeding, set aside BNSF's Abandonment Exemption, set aside SLWC's individual exemption, then grant BNSF and SLWC new individual exemptions. Then let BNSF provide Kessler with information regarding the Line, so that Kessler may determine what the Net Liquidation Value for the Line would be. Once that value was determined, Kessler then would tender funds to BNSF to acquire the Line. BNSF and SLWC would both expeditiously attain their goals of divesting themselves of their common carrier obligations over the Line. Kessler would attain his goal of preserving freight rail service on the Line. The shippers along the Line would have their rail service preserved.

WHEREFORE, in view of the foregoing, Kessler respectfully requests this Board:

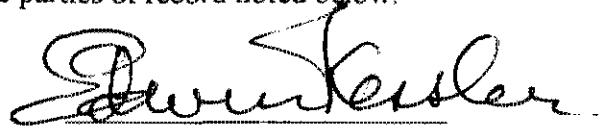
- A. Stay the effective date of BNSF's AE, pending action on Kessler's Petition to Reopen;
- B. Revoke the Abandonment Exemption granted to BNSF;
- C. Revoke the individual exemption granted to SLWC;
- D. Grant BNSF an individual exemption to abandon its common carrier obligations between MP 539.96 and MP 542.91;
- E. Grant SLWC a new individual exemption to discontinue service between MP 539.96 and MP 542.91;
- F. Toll the date an Offer of Financial Assistance must be made by, until 30 days after BNSF has provided Kessler with the information he has requested;
- G. And for such other and further relief as may be appropriate.

Respectfully,


Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2007, a copy of the foregoing Petition for *Ex Parte* Emergency Stay, and Supplement to Petition to Reopen / to Reconsider, was served by first class mail, postage prepaid, upon the parties of record noted below.


Edwin Kessler

Sidney L. Strickland, Jr.
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Karl Morell
Ball Janik LLP
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Washington, DC 20005
(202) 638-3307

Fritz Kahn
8th Floor
1920 N Street, N.W.
Washington, DC 20036-1601
(202) 263-4152

VERIFIED AFFIDAVIT OF THOMAS ELMORE
March 20, 2007

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On February 21, 2007, at approximately 10:00 a.m., I received a telephone call from John Bowman, the Oklahoma Department of Transportation Project Manager for the New I-40 Crosstown Relocation Project. During that telephone conversation, Mr. Bowman stated he had been informed by a Washington, D.C. lawyer that the BNSF Railway Company had authority to abandon that portion of its railroad line that is the subject of the proceeding in *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK, AB-6* (Sub- No. 430X) ("Line"). Mr. Bowman further stated that he was starting the process to begin demolition of the Line.

3. I have seen the February 18, 2007 photographs Edwin Kessler took of rail cars at the Producers Co-op Oil Mill, located in Oklahoma City, Oklahoma. None of the following rail cars, which appeared in Mr. Kessler's February 18, 2007 photographs of the Producers Co-op Oil Mill, were still at the Co-op site when I visited the Co-op site on February 27, 2007: BN 249129 (a box car); NATX 250686, PROX 74296, UTLX 642593, UTLX 665568, DBUX 250306, DBUX 250212, DBUX 250311 (all tanker cars).

4. On February 27, 2007, I visited the Producers Co-op Oil Mill, located in Oklahoma City, Oklahoma. On that date I photographed a BNSF crew delivering a new set of rail cars to the Co-op site. The engine numbers were BNSF 3828 and BNSF 3956. The car numbers for the cars that were delivered to the Co-op site on February 27, 2007 were: RBOX 32454, BN 249984, BN 249525, BN 725610, BN 725966 (all box cars); DBUX 250201, NATX 250396 (tanker cars). Photograph No. One attached hereto depicts BNSF engine # 3828, BNSF "slug" #3956, and a long string of rail cars as they entered the Co-op site. Photograph No. Two depicts BNSF engine # 3828, and BNSF "slug" #3956 as they exited the Co-op site, minus all the rail cars that were delivered to the Co-op site.

5. Attached hereto is a copy of a letter dated August 22, 2005 from BNSF to Jim H. Hatt, Oklahoma Department of Transportation; Mid-States Wholesale Lumber; and to Oklahoma City Reload, Inc. Also attached is a copy of a letter dated September 23, 2005. I acquired a copy of these letters from Norman Hill, General Counsel, Oklahoma Department of Transportation via the Freedom of Information Act.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.

Thomas Elmore
Thomas Elmore

3.20.07
Date

STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

I HEREBY CERTIFY, that on this 20th day of March, 2007, before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal.

My commission expires: 3-5-11

Rita A. Cory
Notary Public

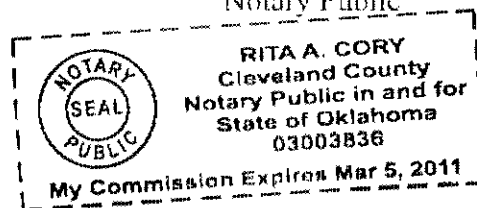
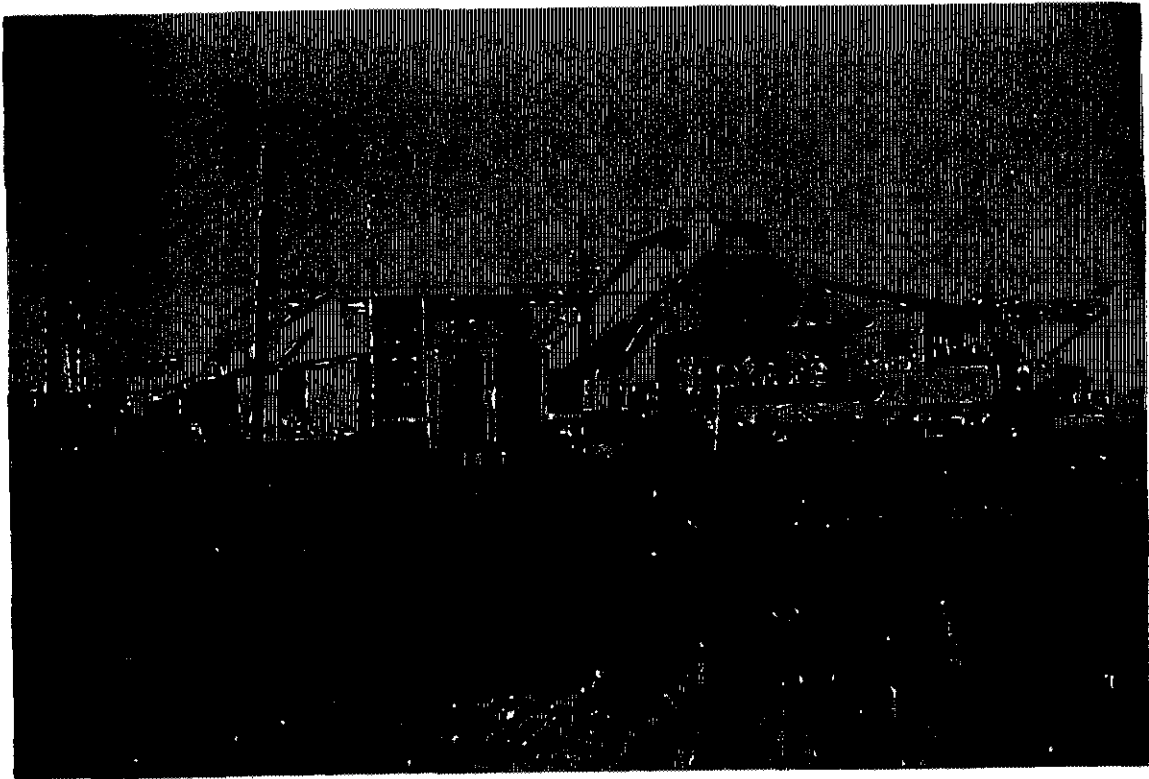
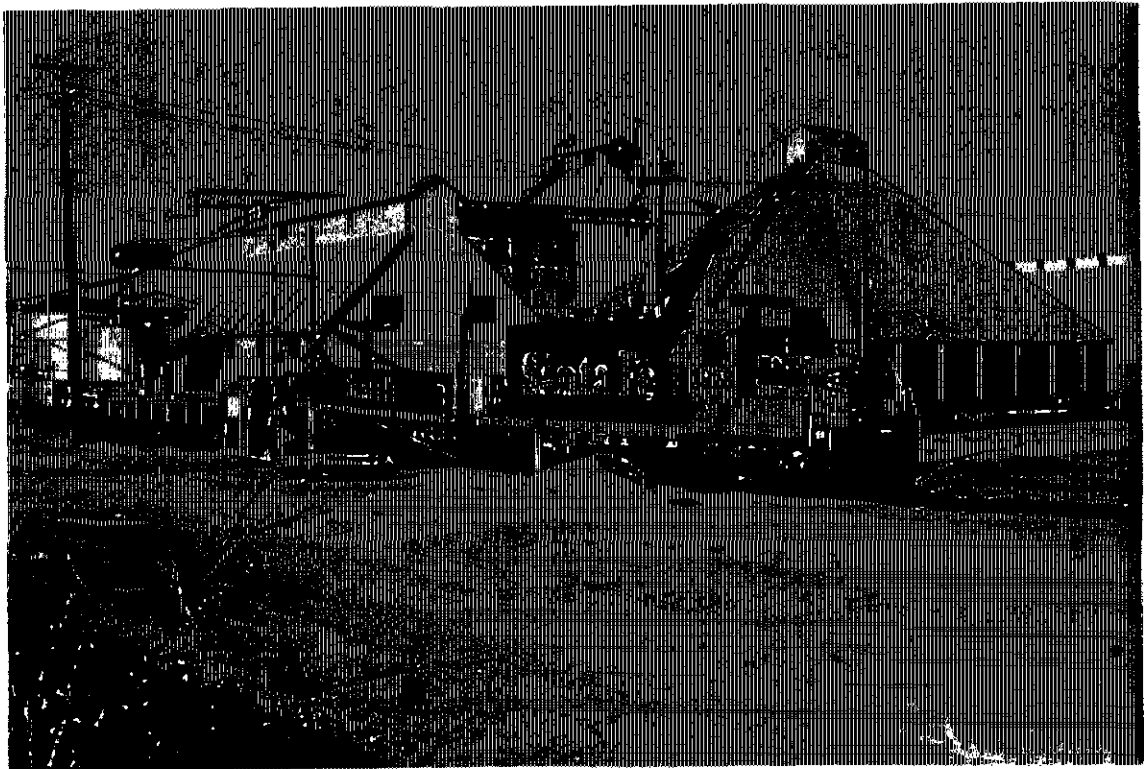


Exhibit 1



#1



#2



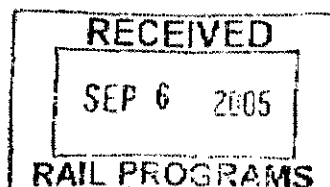
Spencer D. Arnold
Assistant Director Public Projects

BNSF Railway Company

80 - 44th Avenue N.E.
Minneapolis, MN 55421
Email: spencer.arnold@bnsf.com
Telephone: 763-782-3478
Fax: 763-782-3061
Cell: 612-802-9415

August 22, 2005

Jim H. Hatt
Rail Programs Division
Oklahoma Department of Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105-3204



Mid-States Wholesale Lumber
101 S. E. 4th Street
Oklahoma City, OK 73129

Oklahoma City Reload Inc.
P.O. Box 95125
Oklahoma City, Oklahoma 73143-5125

Dear Sirs:

The State of Oklahoma has an agreement with Union Pacific Railroad Company for the construction of the I-40 canal bridge project that will take out of service the current crossing diamond on the Union Pacific trackage near Mid-States Lumber in Oklahoma City, Oklahoma. In connection with this Project, the industry track accessing Mid-States Lumber Company ("Mid-States Track") will be temporarily taken out of service. BNSF currently serves Mid-States via this track.

Since the Mid-States Track will be inaccessible during this time, Mid-States, Oklahoma City Reload, and BNSF have agreed that BNSF, through its independent contractor, Oklahoma City Reload ("Reload") will transload lumber for Mid-States at an alternate location in Oklahoma City provided the State of Oklahoma reimburses BNSF for any and all costs and expenses associated with BNSF transloading for Mid-States in Oklahoma City. BNSF will submit progressive invoices to the State of Oklahoma which shall be paid to BNSF within thirty (30) of receipt thereof.

All costs associated with dismantling, reconstruction, and restoration of the Mid-States Track shall be borne by the State, through the anticipated use of federal funds. Removal shall be approximately 100' north of the diamond and 400' south of the diamond and can commence after September 1, 2005 and is to be completed by September 15, 2005. Project costs will be billed to the State of Oklahoma.

This agreement shall commence on September 1, 2005 and will remain in effect for as long as BNSF may not access the Mid-States Track as determined by BNSF in its sole discretion.

Please sign below agreeing to conditions noted above and effective date of September 1, 2005 to commence the transload process.


William H. Smith for Mid-States Wholesale Lumber

8/26/05
Date


Gary Pistole for Oklahoma City Reload, Inc

26 Aug 05
Date


BNSF Railway Company

8/30/05
Date


State of Oklahoma, Department of Transportation

8-26-05
Date



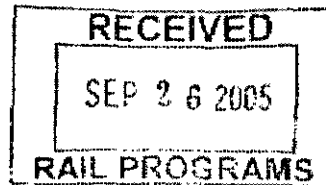
William D. Thomson
Manager Public Projects

WDT
BNSF Railway Company
4515 Kansas Avenue
Kansas City, KS 66106

913-551-4484
913-551-4205 (fax)
William.Thomson@bnsf.com

September 23, 2005
Files: I-40 Relocation - Oklahoma City, OK

Mr. Jim Hatt
Rail Programs Division
Oklahoma Department of Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105-3204



Re: Railroad Project HPPIY-1211(012), JP # 17428(18), Preliminary Engineering,
Transload and Travel Expenses related to I-40 Crosstown Project in Oklahoma City,
Oklahoma with BNSF Railway Company.

Dear Mr. Hatt:

Reference is made to previous correspondence concerning the above-mentioned project.

The estimated cost for transloading cars for Mid-State Lumber Company is \$22,800.00. This figure is based on an average of two cars per month for a total of 24 cars per year at \$950.00 per car.

If you have any questions, please feel free to contact me. Your continued cooperation is most appreciated.

Yours truly,

William D. Thomson
William D. Thomson

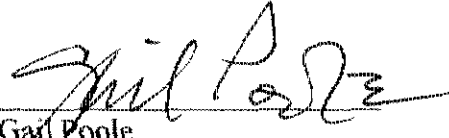
VERIFIED AFFIDAVIT OF GAIL POOLE
February 22, 2007

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On February 15, 2007, at approximately 5:30 p.m., I was standing on the north side of the BNSF right-of-way where it crosses McKinley Ave at grade, in Oklahoma City, Oklahoma. As I was looking east toward the center of Oklahoma City, I observed a train approaching from the east, heading west. I took several photographs of the train as it was approaching, as it passed by, and as it continued to head west. One of those photographs is attached to this Verified Affidavit. The lead locomotive was identified as LLPX 213. The second locomotive was identified as HLCX 363.

3. The attached Oklahoma Trackage diagram ^(Exhibit 4) depicts where I was standing, and the direction the camera was pointed at the time I took the attached photograph. This is noted: "Photo #1." The diagram also depicts the locations of Mid States Lumber Company, Producers Co-op Oil Mill, the Boardman Company, the Chase Bank Building (which is clearly visible in Photograph No. 1), the Union Pacific ("UP") tracks, BNSF's north-south Red Rock Subdivision line, and BNSF's east-west Packing Town Lead. The milepost markings on the diagram were determined by proportional scaling.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.


 Gail Poole 22 FEB 2007
Date

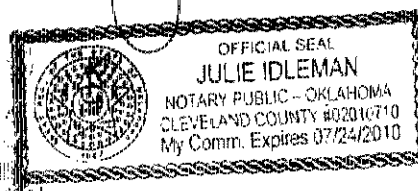
STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

I HEREBY CERTIFY, that on this 22nd day of February, 2007, before me, a Notary Public of said State, personally appeared Gail Poole, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal.

My commission expires: July 24, 2010


 Notary Public



Chase Bank
Building



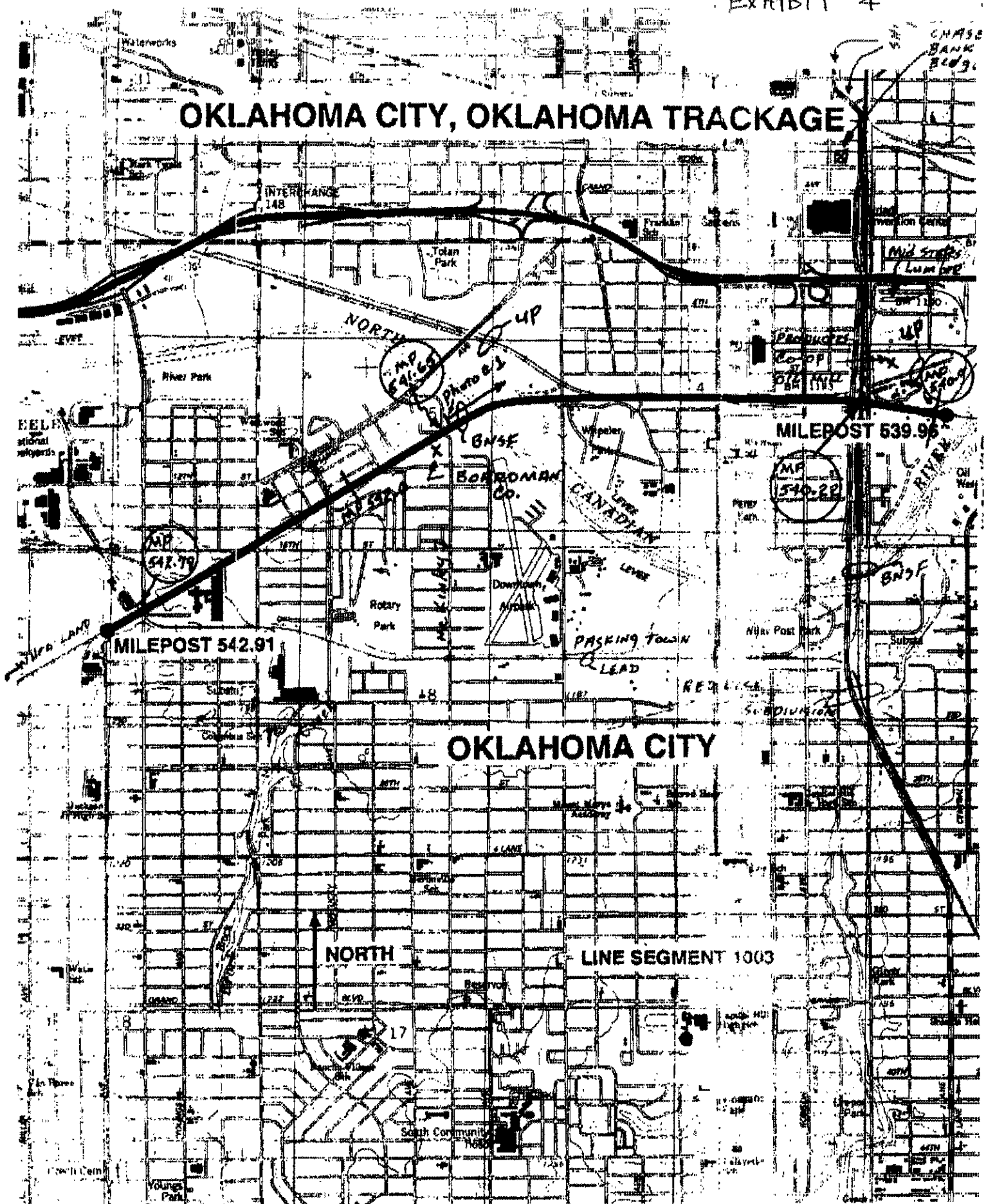


EXHIBIT THREE

MDRC

81 Century Lane
Watchung, NJ 07089

Phone: (908) 361-2435

February 22, 2007

Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072

Dear Mr. Kessler:

Recently we read your Notice of Intent to File an Offer of Financial Assistance in AB 6 (Sub. No. 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, Oklahoma*. In your filing, you indicated you have a desire to purchase from BNSF that portion of its line that it desires to abandon in Oklahoma City, Oklahoma.

Our company is looking for a location to maintain and repair rail cars. Oklahoma City would be an ideal location for these activities, particularly since a rail car manufacturer is located less than one mile from the line you propose to purchase. In addition, the line you propose to purchase is located adjacent to a Union Pacific line. Having access to two Class I carriers is highly desirable.

With the above in mind, if you are successful in acquiring the BNSF line, please contact us, so that we may move forward with our desire to locate our facility along your newly purchased line.

Sincerely,



J. Dennis, CEO
MDRC

VERIFIED AFFIDAVIT OF EDWIN KESSLER

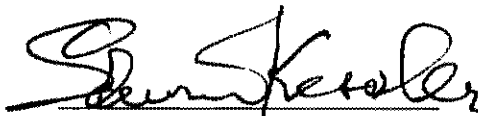
March 19, 2007

1. I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2. On February 18, 2007, I visited the Producers Co-op Oil Mill, located in Oklahoma City, Oklahoma. On that date I photographed the following rail cars that were on the tracks inside the Co-op facility: BN 249129 (a box car); NATX 250686, PROX 74296, UTLX 642593, UTLX 665568, DBUX 250306, DBUX 250212, DBUX 250311 (all tanker cars).

3. Attached hereto are two photographs I took on February 18, 2007, while visiting the Co-op site. Photograph No. One depicts the BNSF line which is the subject of AB 6 (Sub No. 430X). The photograph is looking east. In the foreground is a signal box marked MP 540.2. The line in the middle is the line BNSF proposes to abandon. The line on the right connects to the north-south Red Rock line. The line on the left is the lead that goes into the Co-op site. In the middle ground, the lead to the Mid-States Lumber Company can be seen. The Mid-States Lumber Company lead connects to the BNSF main line approximately 200 feet east of where the Producers Co-op Oil Mill lead connects to the BNSF main line. Photograph No. Two shows some of the rail cars I observed and photographed inside the Co-op site on February 18, 2007.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.


Edwin Kessler

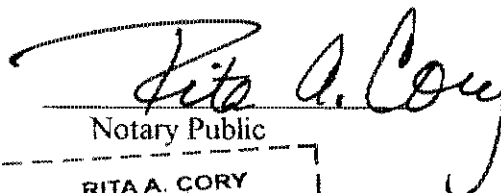
March 20, 2007
Date

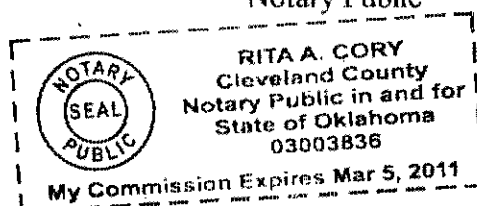
STATE OF OKLAHOMA, Cleveland COUNTY, to wit:

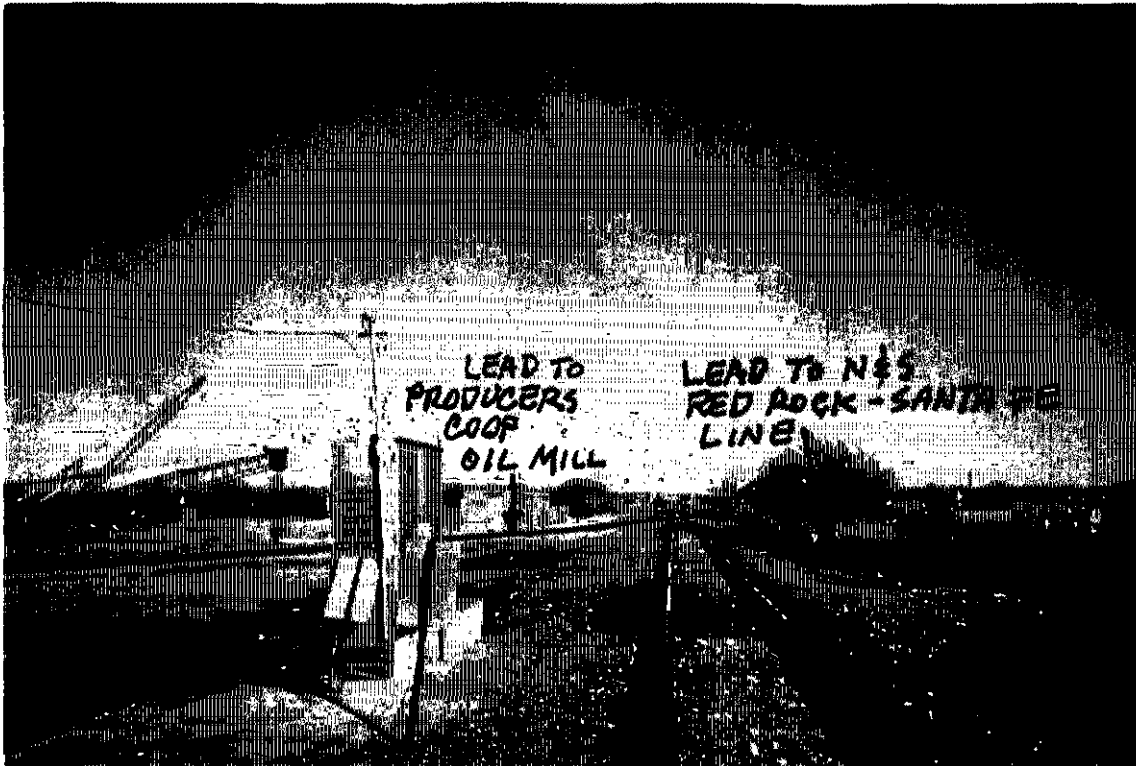
I HEREBY CERTIFY, that on this 20th day of March, 2007, before me, a Notary Public of said State, personally appeared Edwin Kessler, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal.

My commission expires: 3-5-11


Notary Public





BNSF TRACK AT MILEPOST 540.2 -LOOKING EAST



200 FT. SOUTH OF THE INTERSECTION OF SANTA FE AVE AND 6TH STREET -LOOKING NORTH

Google

Address 5 SE 6th St
Oklahoma City, OK 73129



I-40

Exhibit 6

NORTH CANADIAN RIVER

SLWC
NORTH YARD

FEBRUARY 19
2007

MP 539.96
LINE BEING
ABANDONED

BNSF N-S
RED ROCK LINE

MP 540.22

PROVIDERS
CO-OP ALLIANCE

MID-STATE LUMBER